TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]96

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 29, 1920.

(27,784)

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SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 1, 1921.

1 Court of Claims.

No. 33081.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY

vs.

THE UNITED STATES.

I. *History of Proceedings.*

On June 28, 1915, the claimant filed its original petition.

On May 27, 1918, the defendants filed a motion for leave to withdraw the general traverse and to require the plaintiff to make its petition more definite and certain. This motion was allowed in open court on May 27, 1918.

On August 6, 1918, by leave of court, the plaintiff filed an amendment to the petition.

On October 2, 1918, the defendants filed a demurrer to the petition as amended.

On December 23, 1918, by leave of court, the claimant filed a second amendment to the petition.

On January 14, 1919, the demurrer was argued and submitted by Mr. J. Robert Anderson and Mr. Joseph Stewart, for the defendants, and by Mr. S. S. Ashbaugh, for the plaintiffs.

On February 3, 1919, the court overruled, without prejudice, the defendant's demurrer.

On February 28, 1920, the claimant filed a motion for leave to amend the petition by interlineation. This motion was allowed by the court March 1, 1920, and said interlineations made.

The petition, as amended by the various motions, now reads as follows:

2 II. *Petition as Amended by Various Motions.*

Petition.

(Amended by Interlineation, Filed by Leave of Court, March 1, 1920.)

To the Honorable the Chief Justice and the Associate Judges of the Court of Claims:

Comes now your petitioner, The New York, New Haven and Hartford Railroad Company, and for cause of action alleges:

1st. Your petitioner is a corporation duly organized and existing under and by virtue of the laws of the States of Connecticut, Rhode Island and Massachusetts, and at the times hereinafter mentioned

was and now is operating its trains on its own and leased lines through the States of New York, Connecticut, Rhode Island and Massachusetts, doing business as a common carier of freight, passengers and express, and under the laws of the United States and the Rules and Regulations of the Post Office Department was an agency of the Government of the United States, and in pursuance of certain contracts entered into, also at said times engaged in the transportation of the mails for the United States.

2nd. That on or about the 24th day of October, 1914, the defendants by their officers and agents, presented for shipment and demanded transportation from Philadelphia, Pennsylvania, to Boston, Massachusetts, of five million dollars in gold coin of the United States, and that in accordance with said presentation and demand said gold coin in bulk was accepted and transported by the Pennsylvania Railroad Company from Philadelphia, Pennsylvania, to the Terminal of the Pennsylvania Company at New York, and thence by the Postal Transfer Company to the Grand Central Terminal in the city of New York, that the same was then transported by your petitioner from the Grand Central Terminal in the city of New York to the railroad station in Springfield, Massachusetts, and that the same was then in turn transmitted by the Boston and Albany Railroad Company from said station in Springfield, Massachusetts
to the city of Boston, Massachusetts. The said shipments
3 were made at the special instance and request of the defendants, and for their sole use and benefit.

3rd. That said five million dollars in gold coin had been placed and were contained in one thousand cloth or canvas bags, that said bags were tied, sewed and sealed up so as to prevent any and all inspection of the contents thereof, that each bag contained five thousand dollars, was stamped with the ordinary postage stamps of the United States, but not in the distinctive postage stamps named in the statute, that each bag weighed 18.75 pounds, making in all 18,400 pounds, or 9.2 tons. That for the purpose of convenience in shipment the one thousand bags of gold coin were placed in 167 mail sacks or pouches, and were then transported in the Railway Post Office cars over the lines of the cariers above named.

4th. That said bags of gold coin were not so wrapped and sealed, or so packed within the weight limit given by law, or so stamped with postage stamps of the United States, as to be admitted for transportation as mail of the first class.

Nor were said bags of gold coin, or any or them, open for convenient inspection as provided by law, nor were they, or any of them, packed within the weight limit fixed by the statute, so as to be admitted for transportation as mail of the fourth class.

Nor were said bags of gold coin, or any of them, when presented for transportation, mail matter of any kind or class whatsoever; nor were they, or any of them, when so prepared as above described, nor could they have been, shipped as mail of the United States of any class; nor were they shipped as freight by your petitioner as a common carier.

5th. That at the same time and as a part of the same transaction, the defendants demanded that seven persons should be carried as guards to protect said gold coin, and your petitioner in accordance therewith transported seven men as such guards from said Grand Central Terminal in the city of New York to said station in Springfield, Massachusetts, in addition to said shipment of 9.2 tons of gold coin.

4 6th. That your petitioner had no contract or agreement as to the price or the value of the services for said shipment of gold coin, or *that* transportation of said men as guards, and no payment or settlement whatsoever has been made therefor.

7th. That for the shipment of said gold coin from New York to Springfield as aforesaid the reasonable and the legally established value of the services is the sum of $5,000, the same being your petitioner's proper proportion of the through joint rate, which joint rate is shown by the tariffs for the shipment of express matter on file with the Interstate Commerce Commission, allowed to the line from New York to Springfield, and the passenger fares of said seven men from New York to Springfield aforesaid is the sum of $2.95 each or $20.65, being your petitioner's proportion as is also shown by the tariffs on file, making a total sum of $5,020.65 due your petitioner from said defendants, no part of which, though often demanded, has been paid. Your petitioner further alleges that it has made no assignment or transfer of said claim or of any part thereof, or interest therein.

Wherefore, Your petitioner prays judgment against the United States in the sum of $5,020.65.

THE NEW YORK, NEW HAVEN AND
HARTFORD RAILROAD COMPANY.
By EDWARD G. BUCKLAND,
Its Vice President.

STATE OF CONNECTICUT,
County of New Haven, ss:

Edward G. Buckland, being first duly sworn, deposes and says that he is one of the Vice Presidents and the General Counsel of the New York, New Haven and Hartford Railroad Company, the claimant above named; that he has read the foregoing petition and knows the contents thereof, and that the facts therein stated are true as he verily believes.

EDWARD G. BUCKLAND.

Subscribed and sworn to before me this 14th day of June, 1915.

HARRY E. FRIEND.
Notary Public.

S. S. ASHBAUGH,
Attorney for Claimant.

EDWARD G. BUCKLAND,
General Counsel.

5 *Amendment to the Petition.*

(Filed by Leave of Court Aug. 6, 1918.)

The contract referred to in the first paragraph of the petition was embodied in the distance circular sent out by the Postmaster General for the quadrennial period beginning July 1, 1913, and ending June 30, 1914; a copy of which is hereto attached by order of court, marked Exhibit A, and made a part hereof.

EXHIBIT A.

Number of Route —.

Division of Railway Adjustments,

Post Office Department,

Second Assistant Postmaster General.

Washington.

Read carefully.

Please have this Railroad Distance Circular carefully and properly filled, in accordance with the following instructions, and returned to this office as soon as possible.

In column 1 state the distance from station to next station, junction, or point where mails are put on or off trains.

In column 2 state the names of all railroad stations, junctions, and points where mails are put on or off trains, in the order in which they are reached on outward trips, and designate the stations where your company has no agent or other employee by an asterisk (*).

In column 3 state the name of each post office or postal station which receives mail directly from this route; the same to be opposite the name of the point from which it is supplied, if possible.

In column 4 state the distance by the shortest route open to and used by the public in traveling between the nearest door of the baggage room and the nearest door of the post-office build- where the receipt and delivery of mail is practicable.

In column 5 state the distance between the post office or postal station and the point on the railroad track nearest to such post office or postal station.

State fractions of a mile in hundredths. This is important.

If trains on any part of this route be operated over the tracks of another railroad company, or if they be operated over the tracks of your own company over which another railroad mail route has been authorized, state the points between which such trains are so operated and whether the tracks used are tracks of another company or of your company, using for that purpurpose the blank spaces in this form provided therefor.

If there be any spur tracks from the main line of this route, show location and state the length of such spur tracks, separately. A

"spur" is understood to be a short track, not a branch line.

Have the statement verified by the Chief Engineer or other competent officer of the road, the acceptance on second page signed by the President of Manager of the company, and the seal of the company impressed on the circular. With the distance circular send two copies of latest working schedule showing the trains operated over this route.

Failure to return this circular promptly may cause corresponding delay in adjusting compensation on the route.

____ ____,

Second Assistant Postmaster General.

6 The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service.

____ ____,

President or General Manager.

Impress seal here.

I hereby certify that the statement of distances contained herein is correct.

____ ____,

Chief Engineer.

The Company named below agrees to accept and perform mail service upon the conditions now prescribed by law and the existing regulations of the department, but only because its failure to perform this service would result in an intolerable hardship to the territory which it serves; otherwise, the company would decline to perform such service because of the burden of loss, admitted by the Post Office Department, which such service compels it to bear.

It protests that the pay for such service is inadequate and unreasonably low, and that while according to judicial decision it is not by law compelled to perform the service, nevertheless, it is in fact so compelled. It reserves the right to claim and recover a reasonable compensation for any additional service which it may agree to perform.

This agreement, and acceptance is upon the further condition that this company does not recognize as valid or binding, Postmaster General's Order No. 165, dated March 2, 1907, or said Order as amended by Postmaster General's Order No. 412, dated June 7, 1907.

This company cannot accept as full compensation for services rendered, the amount fixed according to the method of computation of average weight prescribed by such order. It reserves the right to insist upon payment according to the method of computing the average weight applied by the Department prior to the issuance of Order No. 165, issued by the Postmaster General, March 2, 1907.

This company reserves the right to terminate this acceptance and to withdraw from the performance of service upon not less than three months' written notice to the Post Office Department.

This company also reserves the right to refuse to stop express trains for the purpose of receiving or discharging parcel post or other

mail which is too heavy or bulky to be thrown off or received from mail cranes while the train is in motion.

Care should be exercised to state the title of the company actually operating the railroad, in the blank space below, as the company therein named will be accepted as being entitled to the compensation for the service, and to prevent any misunderstanding as to title the seal of the company should be impressed.

Title: —— Rail— Co., State of ——, Route No. —, from —— to ——. Lap service: From —— to ——, over tracks of —— Rail— Co., from —— to ——, over tracks of —— Rail— Co., from —— to ——, over tracks of —— Rail— Co.

7 1. Distance from Station to next Station, Junction, or point where mails are put on or off tarins. Miles — 100ths of a mile.

2. List of Stations, Junctions, or Points Where Mails are put on or off Trains.—Designate Stations where the Company has no agent or other representative thus: *

3. Official name of Post Office or Postal Station receiving or forwarding mail by this route.

4. Distance from Station to Post Office or Postal Station. Miles — 100ths of a mile.

5. Distance from Post Office or Postal Station to nearest point on Railroad Track. Miles — 100ths of a mile.

Notice to Company of Adjustment of Pay.

Post Office Department,

Second Assistant Postmaster General.

Washington, November 13, 1913.

Mr. B. Campbell, Vice President
New York, New Haven & Hartford R. R. Co.,
New Haven, Conn.

SIR:

The compensation for the transportation of mails, etc., on Route No. 106,004, between New York, N. Y., and Boston, Mass., has been fixed from July 1, 1913, to June 30th, 1917 (unless otherwise ordered), under acts of March 3, 1873, July 12, 1876, June 17, 1878, March 3, 1905, March 2, 1907, and May 12, 1910, upon returns showing the amount and character of the service for a number of successive working days, not less than ninety, commencing September 4, 1912, at the rate of $344,231.42 per annum, being $1,502.21 per mile for 229.15 miles; and for R. P. O. car service at the rate of $90,067.65 per annum, being $585.00 per mile for 73.95 miles, New York, N. Y., and Cedar Hill (n.o.) Conn., for 10 lines of 60-ft., 2 lines 50-ft., and 3 lines 55 ft., cars; $300.00 per mile for 145.59 miles, Cedar Mill (n.o.) and Readville, Mass., for 6 lines and one half line of 60-ft., and one line of 55-ft., cars; $520.00 per mile for 9.63 miles, Readville and Boston, Mass., for 7 lines of 60-ft., and 1 line of 55-ft. cars.

This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week.

Attention is called to my letter of June 30, 1913, with reference to the application of order N-. 412 of the Postmaster General, and to the fact that the amount of compensation for the transportation of the mails herein stated is fixed after making such application, and you are again informed that this is all the compensation that will be paid for such service on the route named.

Respectfully,

(Signed) JOSEPH STEWART,
Second Assistant Postmaster General.

2508.

Amendment to Petition.

(Filed by Leave of Court December 23, 1918.)

The N. Y., N. H. & H. R. R. Co.

New Haven, Conn., August 15th, 1913.

To the Post Office Department, Washington, D. C.

GENTLEMEN:

This company respectfully protests against assuming the additional burden imposed upon it by your order effective this date increasing the weight of parcel post.

This company is desirous, as always, of carrying the mail, but must insist in justice to its shippers, passengers and stockholders, that the Government shall assume its fair share of the burden imposed by this additional traffic.

It therefore, reserves the right to decline to carry the additional mail matter resulting from the said order without additional compensation being provided and paid for the same.

Yours truly,

(Signed) C. S. MELLEN,
President.

Post Office Department,

Second Assistant Postmaster General.

Washington, August 22, 1913.

Mr. C. S. Mellen, President
The New York, New Haven & Hartford R. R. Co.,
New Haven, Conn.

SIR:

I am in receipt of your letter of the 15th instant addressed to this Department regarding the carriage of parcel post mail. * * *

The law requires that every railway company carrying the mail shall carry on any train which may run over its road, and without

extra charge therefor, all mailable matter directed to be carried thereon by the Postmaster General. The Department makes no distinction between parcel post mail and other classes of mail, and I trust that your service heretofore furnished will continue without interruption.

Very respectfully,

(Signed) JOSEPH STEWART,
Second Assistant Postmaster General.

9 III. *General Traverse.*

Filed June 7, 1920

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

FRANK DAVIS, JR.,
Assistant Attorney General.

IV. *Argument and Submission of Case.*

On June 7, 1920, this case was argued and submitted by Mr. S. S. Ashbaugh, for the claimant, and by Mr. J. Robert Anderson, for the defendants.

10 V. *Findings of Fact and Conclusion of Law.*

Entered June 14, 1920.

This case having been heard by the Court of Claims, the court upon the evidence makes the following

Findings of Fact.

I.

The plaintiff is a corporation duly incorporated under the laws of the States of Connecticut, Rhode Island, and Massachusetts and is engaged, among other business, in operating mail trains on its own and leased lines through the States of New York, Connecticut, Rhode Island, and Massachusetts.

II.

As the four-year term for which readjustment had been made on route No. 106004, from New York City to Boston, would expire on June 30, 1913, the Postmaster General, on August 23, 1912, sent the plaintiff a Post Office Department distance circular, with a request to fill out certain blanks and return the same to the Second Assistant Postmaster General. As submitted, the circular contained a clause that "The company named below agrees to accept and perform mail

service upon the conditions prescribed by law and the regulations of the department applicable to Railroad Mail Service."

The purpose in sending this circular was to obtain data to be used in connection with the weighing of the mails on the routes named in plaintiff's petition, to adjust the pay for mail service from July 1, 1913, as provided by the several acts of Congress.

The plaintiff returned to the Second Assistant Postmaster General the completed distance circular with an agreement clause substituted for that contained in the original form, which reads:

The company named below agrees to accept and perform mail service upon the conditions now prescribed by law and the existing regulations of the department, but only because its failure to perform this service would result in an intolerable hardship to the territory which it serves; otherwise, the company would decline to perform such service because of the burden of loss, admitted by the Post Office Department, which such service compels it to bear.

On October 9, 1913, the Second Assistant Postmaster General, in a letter to the plaintiff, commenting on the above-substituted agreement clause, said that the company, as in the past, would be subject to all postal laws, regulations, and orders of the Postmaster General which are now or may become applicable during the term of its service and to the customs and practices of the Railroad Mail Service, "and that no other or further compensation for such service performed will be paid than that fixed by the orders of the Postmaster General."

III.

The Postmaster General caused the mails to be weighed on route No. 106004, as required by law, and on November 13, 1913, fixed the amount and rate of compensation for the term beginning July 1, 1913, as follows:

11 The compensation for the transportation of mails, etc., on route No. 106004 between New York, N. Y., and Boston, Mass., was fixed from July 1, 1913, to June 30, 1917 (unless otherwise ordered), under acts of March 3, 1873, July 12, 1876, June 17, 1878, March 3, 1905, March 2, 1907, and May 12, 1910, upon returns showing the amount and character of the service for a number of successive working days, not less than ninety, commencing September 4, 1912, at the rate of $344,231.42 per annum, being $1,502.21 per mile for 229.15 miles; and for R. P. O. car service at the rate of $90,007.65 per annum, being $585.00 per mile for 73.93 miles, New York, N. Y., and Cedar Hill (n. o.), Conn., for 10 lines of 60-foot, 2 lines of 50 foot, and 3 lines of 55-foot cars; $300.00 per mile for 145.59 miles, Cedar Hill (n. o.) and Readville, Mass., for 6 lines and one-half line of 60-foot, and 1 line of 55-foot cars; $320.00 per mile for 9.63 miles, Readville and Boston, Mass., for 7 lines of 60-foot and 1 line of 55-foot cars.

This adjustment was subject to future orders and to fines and deductions, and was based on a service of not less than six round trips per week.

Attention was called to the Second Assistant Postmaster General's letter of June 30, 1913, with reference to the application of Order No. 412 of the Postmaster General, and to the fact that the amount of compensation for the transportation of the mails herein stated was fixed after making such application, and plaintiff was again informed that this was all the compensation that would be paid for such service on the route named.

On the same day, November 13, 1913, notice of such adjustment of compensation was sent to the plaintiff.

IV.

As the four-year term for which adjustment had been made on route No. 106005 of the plaintiff would also expire on June 30, 1913, the Postmaster General, on August 23, 1912, sent to the plaintiff a like distance circular with like request and purpose as that referred to hereinbefore concerning route No. 106004. The plaintiff returned the same with the information called for and with the same substituted agreement clause aboved referred to. To this the Second Assistant Postmaster General replied by letter in the same terms and language as in the case of route No. 106004. Theretofore the mails were weighed on route No. 106005 as on route 106004, and the Postmaster General, on October 10, 1913, fixed the amount and rates of compensation allowed on this route, due notice of which was given the plaintiff as on route No. 106004.

The compensation fixed was as follows:

The compensation for the transportation of mails, etc., on route No. 106005, between Cedar Hill (n. o.), Conn., and Springfield, Mass., was fixed from July 1, 1913, to June 30, 1917 (unless otherwise ordered), under acts of March 3, 1873, July 12, 1876, June 17, 1878, March 3, 1905, March 2, 1907, and May 12, 1910, upon returns showing the amount and character of the service for a number of successive working days, not less than 90, commencing September 4, 1912, at the rate of $51,900.79 per annum, being $858.29 per mile for 60.47 miles; and for R. P. O. car service at the rate of $16,024.55 per annum, being $265.00 per mile for 60.47 miles, Cedar Hill (n. o.), Conn., and Springfield, Mass., for 3 lines of 60-foot, 2 lines of 55-foot, and 2 lines of 50-foot cars.

This adjustment was subject to future orders and to fines and deductions, and was based on a service of not less than six round trips per week.

Attention was called to the Second Assistant Postmaster General's letter of June 30, 1913, with reference to the application of Order No. 412 of the Postmaster General, and to the fact that the amount of compensation for the transportation of the mails herein stated was fixed after making such application, and plaintiff was again informed that this was all the compensation that would be paid for such service on the route named.

On the same day, October 10, 1913, notice of such adjustment of compensation was sent to the plaintiff.

12

V.

Thereafter, the plaintiff continued to carry the mails under said adjustments without further objection or protest.

VI.

Section 8 of the act of August 24, 1912 (37 Stat., 539, 557), provided:

SEC. 8. That hereafter fourth-class mail matter shall embrace all other matter, including farm and factory products, not now embraced by law in either the first, second, or third class, not exceeding eleven pounds in weight, nor greater in size than seventy-two inches in length and girth combined, nor in form or kind likely to injure the person of any postal employee or damage the mail equipment or other mail matter and not of a character perishable within a period reasonably required for transportation and delivery.

The act further provided for carrying out the purposes of section 8, the United States and its several Territories and possessions, except the Philippine Islands, should be divided into eight postal zones, which, by direction of the Postmaster General, were accordingly established as therein provided.

The act of March 4, 1913 (37 Stat., 791, 797), provided:

That on account of the increased weight of mails resulting from the enactment of section eight of the act of August twenty-fourth, nineteen hundred and twelve, making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and thirteen, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after July first, nineteen hundred and thirteen, for the remainder of the contract terms, not exceeding five per centum thereof per annum, excepting upon routes weighed sinced January first, nineteen hundred and thirteen, and to be readjusted from July first, nineteen hundred and thirteen, until otherwise provided by law.

The Postmaster General, on July 25, 1913, reclassified and reformed the weight limit of parcel post packages for transportation in the first and second zones by increasing the weight limit from 11 to 20 pounds, and on December 18, 1913, by increasing the weight limit in all zones from 11 to 20 pounds, and in the first and second zones by increasing the weight limit from 20 to 50 pounds. On July 25, 1913, the rates of postage on parcels exceeding 4 ounces in weight for delivery in the first and second zones were fixed at 5 cents for the first pound and 1 cent for each additional pound or fraction thereof.

On December 6, 1913, for delivery in the third zone the rates of postage were fixed at six cents for the first pound and two cents for each additional pound or fraction thereof, for the fourth zone at seven cents for the first pound and four cents for each additional pound or fraction thereof, for the fifth zone at eight cents for the first

pound and six cents for each additional pound or fraction thereof, and for the sixth zone at nine cents for the first pound and eight cents for each additional pound or fraction thereof.

The plaintiff, on August 15, 1913, in a letter to the Post Office Department, protested against the increase in weight of parcel-post packages and reserved the right to decline to carry the additional mail matter without additional compensation.

On August 22, 1913, the Second Assistant Postmaster General replied that the plaintiff, under the law, if he continued to carry the mails, was not entitled to additional compensation.

13 VII.

On November 14, 1913, the Postmaster General increased the plaintiff's compensation for carrying the mails as follows:

In accordance with the act of March 4, 1913, making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1914, from July 1, 1913, compensation for the transportation of mails on route 106005 was increased at the rate of $2,595.03 per annum, being $42.9144 per mile for 60.47 miles, and 5 per cent increase in compensation fixed by readjustment from July 1, 1913, based on weighing from September 4 to December 17, 1912, inclusive.

The total compensation was thereafter to be at the rate of $54,495.82 per annum, being $901.2043 per mile for 60.47 miles.

This adjustment was subject to future orders and to fines and deductions, and was based on a service of not less than six round trips per week.

This increase was based upon an ascertainment by an estimate of the increased weight of mails resulting from the establishment of the Parcel Post System.

On the same day, November 14, 1913, the plaintiff was notified of this increase in its compensation.

VIII.

On December 4, 1913, the Postmaster General again increased the plaintiff's compensation for carrying the mails, as follows:

In accordance with the act of March 4, 1913, making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1914, from July 1, 1913, compensation for the transportation of mails on route 106004 was increased at the rate of $17,211.57 per annum, being $75.1105 per mile for 229.15 miles, and 5 per cent increase in compensation fixed by readjustment from July 1, 1913, based on weighing from September 4 to December 17, 1912, inclusive.

The total compensation was thereafter to be at the rate of $361,442.99 per annum, being $1,577.3205 per mile for 229.15 miles.

This adjustment was subject to future orders and to fines and deductions, and was based on a service of not less than six round trips per week.

This increase was based upon an ascertainment by an estimate of the increased weight of mails resulting from the establishment of the Parcel Post System.

On the same day, December 4, 1913, the plaintiff was notified of this increase in its compensation.

IX.

On October 23, 1914, the Post Office Department received from the Treasury Department at Philadelphia, Pa., at the United States mint, 1,000 bags each weighing 18¾ pounds and said to contain $5,000 each in gold, for transmission by United States mails from Philadelphia, Pa., to Boston, Mass.

Said bags were properly sealed at the United States mint at Philadelphia before delivery to the postal authorities. They were placed in 167 mail pouches, which were locked with rotary mail locks and labeled "Boston, Mass." The Treasury Department prepaid the postage required for fourth-class mail matter at parcel-post rates, amounting to $420.

These bags were received and treated by the Post Office Department as mail matter of the fourth class, which was thereupon transported from Philadelphia to New York, N. Y., on New York and Pittsburgh R. P. O. train No. 34, of the Pennsylvania Railroad Company, in storage mail car of said train, accompanied by five railway mail officials and postal clerks, all of whom held the regular
14 travel commissions for transportation over the Pennsylvania Railroad between Philadelphia and New York.

A Mail-storage car is a car in which through mails inclosed in pouches and sacks are deposited and transported between stated points, and in which no distribution of the mails is performed, and may be either a car specially equipped with stanchions for the separation of the made-up mails according to destinations or an ordinary baggage car.

X.

On arrival at New York the 167 pouches were placed in a vault at the subtreasury, subject to the call of the chief clerk of Railway Mail Service. Thereafter, on October 24, the chief clerk and other railway-mail officials took the 167 pouches in auto mail trucks from the subtreasury to the Grand Central Station, New York, N. Y., where they were placed in postal car of Boston, Springfield and New York R. P. O. car attached to one of plaintiff's regular passenger trains, train No. 50, in which they were transported to Springfield, Mass., over the New York, New Haven & Hartford railroad, the plaintiff above named, and upon postal routes Nos. 106004 and 106005, mentioned in the petition, and thence to Boston, Mass., over the Boston & Albany Railroad (New York Central & Hudson River Railroad Co., lessee), accompanied by seven officials of the Railway Mail Service; all persons accompanying the same having and holding the requisite travel commissions from the Postmaster General for

transportation over the said railroads between New York and Boston, as prescribed by the Postal Laws and Regulations.

XI.

No protest was made by any carrier and the claimant was paid the amount fixed by the readjustment orders for carrying the mails over its route, and received such payment without protest. Neither the Pennsylvania Railroad Company nor the Boston & Albany Railroad have made any claim against the Government for additional compensation growing out of the transportation aforesaid.

XII.

The express rate, as shown by the Official Express Classification No. 22, effective February 1, 1914, on file in the Interstate Commerce Commission, was $1 for each $1,000 of gold coin transported between New York and Springfield at all times stated in plaintiff's petition.

The regular first-class passenger rate between the points stated above was $2.95 per passenger during all the time covered by the petition.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed. (See New York, New Haven & Hartford R. R. Co. v. United States, 53 C. Cls., 222; 251 U. S., 123; Mail Divisor Cases, 53 C. Cls., 258, 251, 326.)

15 VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Fourteenth day of June, A. D. 1920, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge and decree that the plaintiff herein is not entitled to recover any sum in this action of and from the United States; and that the petition herein be and it hereby is dismissed.

By THE COURT.

VII. *Claimant's Application for and Allowance of an Appeal.*

From the judgment rendered in the above-entitled cause on the 14th day of June, 1920, in favor of the defendants, the claimant, by its attorney on the 22nd day of June, 1920, makes application for, and give- notice of, an appeal to the Supreme Court of the United States.

S. S. ASHBAUGH,
Attorney for Claimant.

Filed June 22, 1920.

Ordered: That the above appeal be allowed as prayed for.

By THE COURT.

June 28, 1920.

16 Court of Claims.

No. 33081.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing is a true copy of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact and conclusion of law; of the judgment of the court; of the claimant's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City this Twenty-eighth day of June, A. D. 1920.

[Seal of Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 27,784. Court of Claims. Term No. 427. The New York, New Haven & Hartford Railroad Company, appellant, vs. The United States. Filed June 29th, 1920. File No. 27,784.

SEP 27 1921
JAMES D. MAHER,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 96

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, *Appellant*

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

Brief for the Appellant

S. S. ASHBAUGH,
Attorney for Appellant.

E. G. BUCKLAND,
A. P. RUSSELL,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1921.

No. 96

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, *Appellant*

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

Brief for the Appellant

1. STATEMENT OF THE CASE

The petition was filed with the Court of Claims on June 28, 1915, demanding pay for the transportation

of 1,000 bags of gold coin, each weighing 18¾ pounds, said to contain $5,000 each, in gold, at the express rate, amounting to $5,000, together with $20.65 for seven passenger fares for armed guards, between the city of New York and the city of Springfield, Massachusetts, which petition is found beginning on page 1 of the record.

The case was tried on June 7, 1920, upon an agreed statement of facts.

On June 14, 1920, the court entered a Findings of Fact, beginning on page 8 of the record, and the Conclusion of Law, dismissing the petition, which judgment of the court is found on page 14 of the record.

An appeal was allowed on June 28, 1920, and the record was filed in the Supreme Court of the United States on June 29, 1920.

2. STATEMENT OF THE FACTS

The New York, New Haven & Hartford Railroad Company, the plaintiff herein, is a corporation duly incorporated under the laws of the States of Connecticut, Rhode Island, and Massachusetts, and is engaged, among other business, in operating mail trains on its own and leased lines through the several States of its incorporation.

On October 23, 1914, the Post Office Department received from the Treasury Department at Philadelphia, Pa., at the United States mint, 1,000 bags, each weighing 18¾ pounds, and said to contain $5,000 each in gold, for transmission by United States mails from Philadelphia, Pa., to Boston, Mass.

Said bags were properly sealed at the United States

mint at Philadelphia before delivery to the postal authorities. They were placed in 167 mail pouches, which were locked with rotary mail locks, and labeled "Boston, Mass." The Treasury Department prepaid the postage required for fourth-class mail matter at parcel-post rates, amounting to $420.

These bags were received and treated by the Post Office Department as mail matter of the fourth class, which was thereupon transported from Philadelphia to New York, N. Y., on New York and Pittsburg R. P. O. train No. 34, of the Pennsylvania Railroad Company, in storage mail car of said train, accompanied by five railway mail officials and postal clerks, all of whom held the regular travel commissions for transportation over the Pennsylvania Railroad between Philadelphia and New York.

A Mail-storage car is a car in which through mails inclosed in pouches and sacks are deposited and transported between stated points, and in which no distribution of the mails is performed, and may be either a car specially equipped with stanchions for the separation of the made-up mails according to destinations or an ordinary baggage car.

On arrival at New York the 167 pouches were placed in a vault at the subtreasury, subject to the call of the chief clerk of Railway Mail Service. Thereafter, on October 24, the chief clerk and other railway-mail officers took the 167 pouches in auto mail trucks from the subtreasury to the Grand Central Station, New York, N. Y., where they were placed in postal car of Boston, Springfield and New York R. P. O. car attached to one of plaintiff's regular passenger trains, train No. 50, in

which they were transported to Springfield, Mass., over the New York, New Haven & Hartford Railroad, the plaintiff above named, and upon postal routes Nos. 106004 and 106005, mentioned in the petition, and thence to Boston, Mass., over the Boston & Albany Railroad (New York Central & Hudson River Railroad Co., lessee), accompanied by seven officials of the Railway Mail Service; all persons accompanying the same having and holding the requisite travel commissions from the Postmaster General for transportation over the said railroads between New York and Boston, as prescribed by the Postal Laws and Regulations.

The express rate, as shown by the Official Express Classification No. 22, effective February 1, 1914, on file in the Interstate Commerce Commission, was $1 for each $1,000 of gold coin transported between New York and Springfield at all times stated in plaintiff's petition.

The regular first-class passenger rate between the points stated above was $2.95 per passenger during all the time covered by the petition.

Upon the foregoing facts the plaintiff claims that the 1,000 bags of gold, contained in 167 mail pouches, were not mail of any class within the law or the Rules and Regulations of the Post Office Department, and were not offered by the Post Office Department to the Plaintiff to be transported as mail, between New York and Springfield, and that the seven armed guards were not transported in connection with this shipment of gold as officers of the Government entitled to free transportation, and that by reason of the facts above set out, the more extensively set out in the different sections

of the Findings of Fact by the court below, the plaintiff is entitled to recover the cost of transportation as express matter, in accordance with the express rate set out in the Findings of Fact, together with the passenger fares for the armed guards, all in the sum of $5,020.65.

3. ASSIGNMENT OF ERRORS

1. The court below erred in not finding that the shipment of gold coin was not within the law, and the Rules and Regulations of the Post Office Department.

2. The court erred in not finding that sealed packages of gold coin, each weighing 18¾ pounds, was not within the law and the Rules and Regulations of the Post Office Department for the shipment of parcel-post packages.

3. The court erred in not rendering judgment in favor of the plaintiff, upon the facts set out in the Findings of Fact made by the court.

4. The court erred in rendering judgment for the defendants, and in dismissing the petition of the plaintiff.

ARGUMENT

I.

The Contract of July 1, 1913 Did Not Include the Shipment of Gold Coin as Parcel Post Matter

The contract of July 1, 1913, was expressed by the distance circular set out in Exhibit A of the record,

the principal parts of which are included in Section II of the Findings of Fact, which as shown on page 9 of the record, contains the following provision:

> "The Company named below agrees to accept and perform mail service upon the conditions now prescribed by law and the existing regulations of the department."

This is not a mail-pay case at all. It is an action for the transportation of express matter not included by law or by any rule or regulation of the Post Office Department within the classifications of mail matter. The contract as shown above provided for the carrying of mail and the performance of mail service upon the conditions in existence on July 1, 1913, as prescribed by law and the existing regulations of the Post Office Department. This shipment of gold coins, as described in the Findings of Fact, was not within the contract by any possible construction, and the railroad company in performing the service was not performing any mail service prescribed by law, or by any rule or regulation of the Department. The distance circular further provides that the company "reserves the right to claim and recover a reasonable compensation for any additional service which it may agree to perform." The appellant in this case, is not asking for additional pay for hauling the mails. Its rights in such a case were foreclosed by the decision of this Court in the case of the *New Haven Railroad Company* vs. *the United States* (251-U. S.-23); and no such claim is repeated in this action.

On July 1, 1913, when this contract for mail service was executed, the weight limit was 11 pounds in one

package, and certainly under this contract the plaintiff could not be required or expected to carry mail packages of 18.75 pounds. There was no agreement to accept packages in the future of nearly double that weight then prescribed by law. This contract could not be changed at a subsequent time by the Postmaster General alone, even if he had the authority to raise the weight limit by his own order as to other shipments. The appellant, on October 24, 1914, had never agreed to accept and carry any such packages as were shipped in this consignment of gold coins. The Findings of Fact, under Sections III, IV, VII, and VIII, are utterly immaterial to the issues of this case, and may be entirely disregarded.

The further Findings of Fact under Section VI, set out on page 11 of the record, concerning orders of the Postmaster General, pretending to increase the weight limit of parcel-post packages from 11 to 20 pounds, and then from 20 to 50 pounds, are also immaterial, as these orders, even if legal and valid as to others, were made after the contract with the appellant was entered into on July 1, 1913. These subsequent orders, even if legal and valid, could not apply to the contract of the plaintiff, then in existence, beginning on July 1, 1913, and ending July 1, 1917.

To the making of these orders, the appellant promptly protested, and as shown by the letter of Mr. Mellen under date of August 15, 1913, set out on page 7 of the record, which protest was acknowledged on August 22, as shown on the same page. It was clearly recognized by Congress, that parcel-post packages under Section 8 of the Act of August 24, 1912, 37 Stat.,

557, Compiled Statutes, 1918, Par. 7319, were not ordinary mail referred to by the Postmaster General in his letter of August 22, but were new and additional kinds of matter imposed upon the mail service, without any authority of law or within any rule or regulation of the Post Office Department. Carrying parcel-post packages above 11 pounds in weight was not within the plaintiff's contract of July 1, 1913, and the railroad company could not be compelled to carry these packages of 18.75 pounds a piece, and the compensation for the carrying of mail did not cover the compensation for the transportation of this shipment of gold coins.

Union Pacific R. R. v. *United States*, 104 U. S., 662, 26 L. 885.

Chicago and Northwestern R. R. v. *United States*, 104 U. S., 680, 26 L. 891.

Chicago, Milwaukee & St. Paul R. R. v. *United States*, 104 U. S., 687, 26 L. 893.

Atchison, Topeka and Santa Fe R. R. v. *United States*, 52, Ct. Cl., 338.

In the contract of July 1, 1913, there was no such reservation as would authorize an increase of the weight limit without increased compensation, as was made in the cases of

Eastern Railway Company v. *United States*, 129 U. S., 391, 32 L. 731.

Chicago, Milwaukee & St. Paul R. R. v. *United States*, 198 U. S., 385.

So far as this contract is concerned, these parcels of gold coin weighing 18.75 pounds were not within its terms, for the plaintiff had agreed to carry only such mail as was on July 1, 1913, "prescribed by law and

the existing regulations of the Department," and the "law and the existing regulations" then limited the weight to 11 pounds.

II.

The Orders of the Postmaster General Could Not Bring the Shipment of Parcel-Post Packages of 18.75 Pounds Within the Law, and the Existing Regulations of the Department on July 1, 1913.

Section 8 of the Act of August 24, 1912 (37 Stat., 539, 557), is set out in the 6th Section of the Findings of Fact, on page 11 of the record and reads as follows:

> "That hereafter fourth-class mail matter shall embrace all other matter, including farm and factory products, not now embraced by law in either the first, second, or third class, not exceeding eleven pounds in weight, not greater in size than seventy-two inches in length and girth combined, nor in form or kind likely to injure the person of any postal employee or damage the mail equipment or other mail matter and not of a character perishable within a period reasonably required for transportation and delivery."

This section of the statute had not been changed on October 24, 1914, when the shipment of gold coin was made, and in fact has never been changed by an act of Congress. If it were material, it could be shown as a matter of law that the Postmaster General had no power under the different paragraphs of Section 8 to change the weight limit from 11 to 20 and then to 50 pounds, as was pretended to be done. It is perfectly

clear from the later paragraph of the section that the classification of articles mailable "as well as the weight limit, the rates of postage, zone or zones, and other conditions of mailability under this act," could only be reformed and readjusted so as to render the act of Congress more strictly applicable to the conditions then in existence. It is not necessary, however, for us to argue that the orders of the Postmaster General of July 25 and December 18, 1913, increasing the weight limits from 11 to 20 and then to 50 pounds are illegal and void, because these orders were all issued after the contract was executed with the appellant on July 1, 1913, and could not be made applicable to the contract then in existence.

From these facts it is plain that the shipment of gold coin in packages of 18.75 pounds, which were not mail matter at all of any kind, and were not included within the contract with the appellant, or within the compensation paid for carrying the mails; for this reason sections VII and VIII of the Findings of Fact are also irrevelent and immaterial to the issues in this case.

III.

The Packages Were Not Stamped According to Law.

It is stated in Section IX of the Findings of Fact, on page 13 of the record, that "The Treasury Department prepaid the postage required for fourth-class mail matter at parcel-post rates, amounting to $420.4." It is a matter of common knowledge, of which this will take judicial notice, that the statute of August 24,

1912, 37 Stat., 557, Par. 7321, Compiled Statutes, 1918, being also section 445 of Postal Laws and Regulations, 1913, state that, "the postage in all cases, to be prepaid by distinctive postage stamps affixed."

It is well known that when this section of the statute was reprinted by the Postmaster General in 1913, he omitted the word "distinctive" and inserted three stars in its place. It is also well known that the Postmaster General has never complied with this law. In this case the postage which was paid by the Treasury Department was not paid in the "distinctive" postage stamps required by the statute. The Postmaster General can no more waive one section of the statute than another section of the statute, and then in violation of the positive contract, take advantage of his own waiver. These packages were not mail.

IV.

Gold Coins Cannot be Shipped in Sealed Packages of 18.75 Pounds each as Mail Matter of the First Class, and Sealed Packages Above 4 Pounds in Weight Are Not Mail of Any Class, According to Law or to the Rules and Regulations of the Department.

The second paragraph of Section IX of the Findings of Fact provides as follows

> "Such bags were properly sealed at the United States mint at Philadelphia before delivery to the postal authorities. They were placed in 167 mail pouches, which were locked with rotary mail locks and labeled, 'Boston, Mass.' "

Section 881 of the Postal Laws and Regulations of 1913 provides:

> "Coin in bulk, or heavy articles of medium or large size, when sent in registered letters, shall be sewed in canvas or material of equal strength, then wrapped in strong paper and securely sealed."

Here is a specific provision for the carrying of certain classes of mail. This provision applies to mail of the first class, and by section 462, the weight limit of mail matter of the first class is fixed at 4 pounds. The shipment of gold coin in packages of 18.75 pounds could not, therefore, be mail of the first class under any statute or regulation of the department.

Neither could the shipment of gold coin in packages, which were sealed, be mail of the fourth class under any statute or regulations of the department. Section 469, Postal Laws and Regulations, 1913, being paragraph 7335, Compiled Statutes, 1918, provides that the Postmaster General may prescribe by regulation "the manner of wrapping and securing for the mails all packages of matter not charged with first-class postage, so that the contents of such packages may be easily examined."

There was no statute or rule or regulation of the department authorizing parcel-post matter to be shipped in sealed packages which pouches "were locked with rotary mail locks."

It is clear from the above statutes, the rules and regulations of the Postoffice Department, and from the Findings of Fact, that these 1,000 packages of 18.75 pounds each, which were "placed in 167 mail pouches,

which were locked with rotary mail locks," were not shipped in accordance with any law or rule or regulation of the Postoffice Department, and therefore did not come within any of the terms of the contract for the carrying of the mails by the appellant executed on July 1, 1913.

It is claimed by the Postmaster General that the size of the packages and the rules and regulations for wrapping and shipping of packages, are solely for the benefit of the Post Office Department, and could not be taken advantage of by the carrier in this case. This might be true if the carrier was not affected by it in violation of his contract provisions. It is true that the appellant cannot prosecute the Postmaster General for violating the law, but that is not the point. In this case the appellant agreed to carry mail matter as prescribed by the law and the rules and regulations of the Post Office Department on July 1, 1913, and it cannot be claimed that the Postmaster General may so change his own rules and regulations as to utterly change the nature of this contract. In other words, the Postmaster General could not change his own rules and regulations after July 1, 1913, so as to make mail matter of express matter or freight, after that date, and then claim that it was of no concern of the appellant in this case. Neither the Secretary of the Treasury, nor the Postmaster General can violate the statutes of Congress, or the rules and regulations of the Post Office Department, and then claim that the appellant can be compelled to perform services not within its contract. Neither the Secretary of the Treasury nor the Postmaster General have any authority within the law or

within the rules of the department to declare the shipment of gold coins, as described in the Findings of Fact, mail of the fourth class so that the appellant would be required to perform such transportation as mail service.

If the railroad company had known that such a shipment of gold coins was to be made on October 24, 1914, and had positively refused to transport the same, neither the Secretary of the Treasury nor the Postmaster General could have compelled the performance of this service by a writ of mandamus, or any other process of court. If the appellant had on that date known of the prospective shipment, and then had refused to transport the same as mail matter, it could not be said that an action would lie against the appellant for violation of its contract, as set out in the distance circular of July 1, 1913.

The simple fact is that this shipment was in open and notorious violation of the law and the rules and regulations of the Post Office Department, and did not come within the provisions for the shipment of mail of the first or of the fourth class.

V.

The Seven Officials Were Passengers and Not Entitled to Free Transportation on this Trip.

It is shown in sections IX and X of the Findings of Fact, set out on page 13 of the record, that the appellant transported seven officials of the railway mail service to accompany the shipment of gold coin in issue. It is not claimed that these seven officials of the

railway mail service were transported in connection with any other mail service, but it is found that they accompanied the shipment in question. On proper official business and in connection with shipment of mail, these officials of the railway mail service were entitled to free transportation, but they were not entitled to free transportation to accompany a shipment of express matter or of freight, for these 1,000 bags of gold coin, each weighing 18.75 pounds, properly sealed before delivery, and placed in 167 mail pouches, which were locked with rotary mail locks, all weighing 9.2 tons, were not packages of mail within the law and rules and regulations of the Post Office Department. Then these packages being shipped on the appellant's regular passenger train No. 50 from New York to Springfield, Mass., were subject to the express rate of $1.00 for each $1,000 of gold coin, according to Official Express Classification No. 22, effective February 1, 1914, on file in the Interstate Commerce Commission, as shown in section XII of the Findings of Fact.

If this shipment was not mail, but was express, then the seven officials of the railway mail service were merely passengers upon the train from New York to Springfield, Mass., and the appellant is entitled to recover $2.95 for each transportation, as is also found in section XII of the Findings of Fact.

VI.

The Decision of the Court Below in the Case at Bar is in Conflict with the Prior Decision of the Same Court, Establishing the Law of Such a Contract as Was Executed on July 1, 1913.

In the case of *Wolverton* v. *The United States*, 34 Ct. Cl., 247, the Court said:

> "V. Under a mail contract, the carrying of empty bags beyond those made necessary by the preponderance of mail in one direction is extra service."

At page 270 Judge Davis said in the opinion

> "This is not a railway mail, and it is not a mail properly falling within the service contracted for by the plaintiff. The fact that in the performance of one service he visited a point in New Jersey is not a reason for imposing upon him an entirely different kind of service, theretofore performed under a different contract by another contractor. This work we regard as extra to the contract for 'Covered regulation wagon mail messenger, transfer, and mail station service in the city of New York, N. Y.,' and for performing it plaintiff should have reasonable compensation."

The case at bar is much stronger than the *Wolverton* case quoted above. The *Wolverton* case was brought for additional compensation in performing a similar service; in the case at bar the action is brought for the performance of an entirely different service than that mentioned and provided for in the contract.

The *Wolverton* case had not been overruled or set

aside, and in itself should have controlled the decision of the court below, but it cannot be claimed that the Postmaster General could bring within the contract of July 1, 1913, what neither then nor now is mail of the first or fourth class.

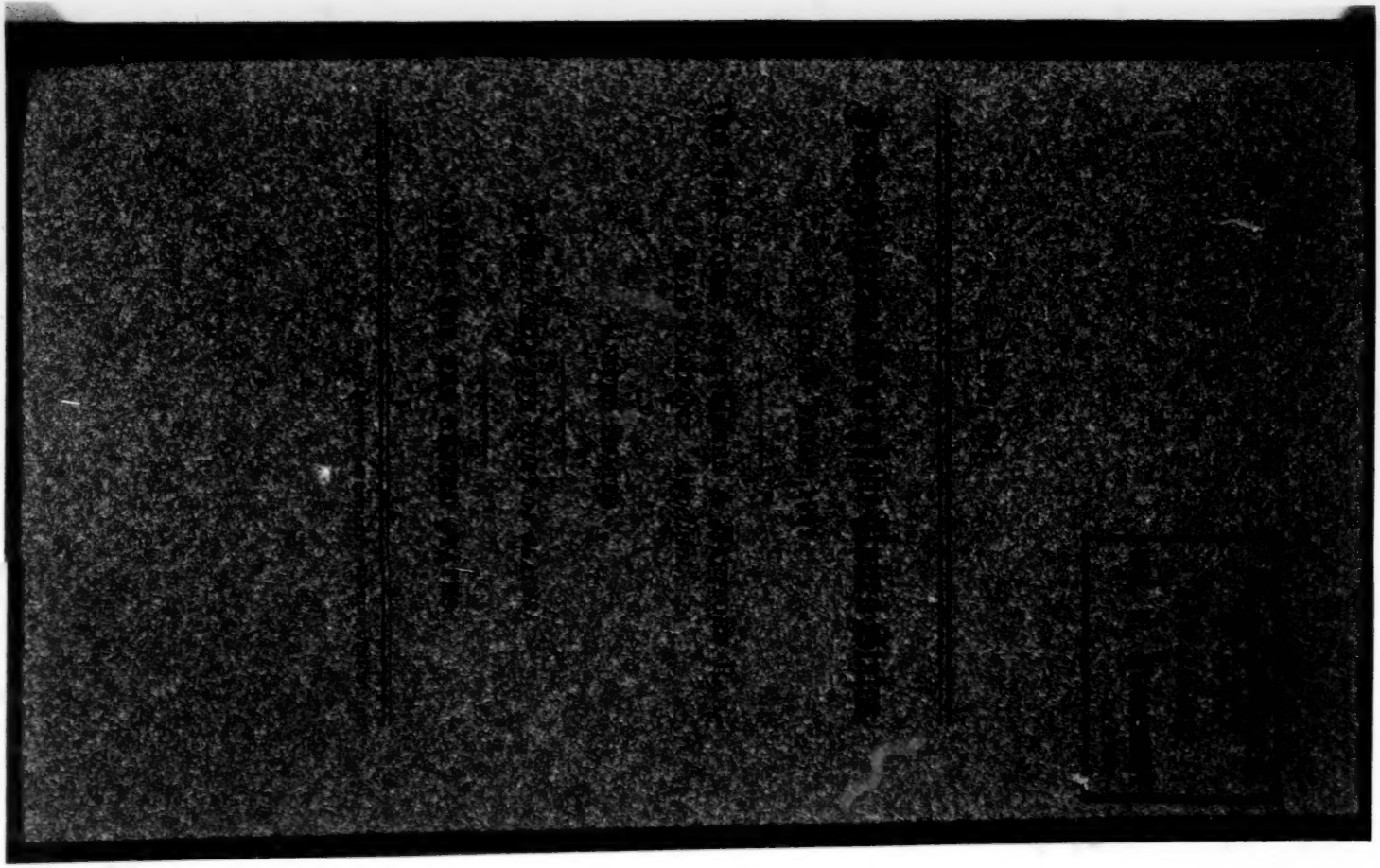
The express rates on gold coin shipped as described in the Findings of Fact were $1.00 for each $1,000 of gold coin, and the first-class passenger rates were $2.95 for each passenger. This gold coin was not mail and it was not freight, but was express, and the express charges were the sum of $5,000, which with the seven passenger fares make a total of $5,020.65, for which sum judgment is prayed.

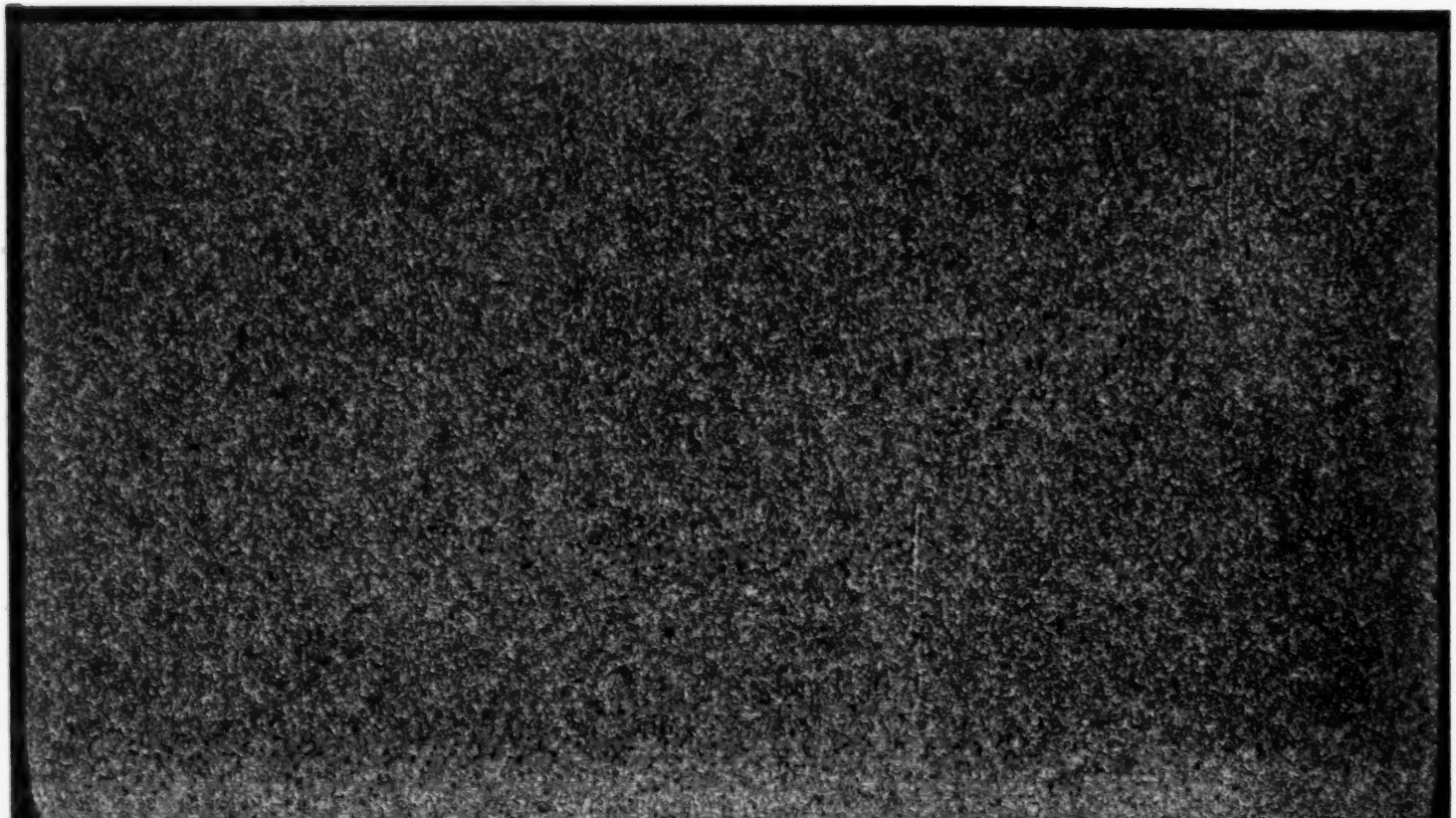
For the reasons above given, the judgment of the court below should be reversed and judgment ordered according to the Findings of Fact.

Respectfully submitted,

S. S. ASHBAUGH,
Attorney for Appellant.

E. G. BUCKLAND,
A. P. RUSSELL,
Of Counsel.





In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE NEW YORK, NEW HAVEN & HARTFORD Railroad Company, *Appellant*, *v.* UNITED STATES. } No. 96.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On October 23, 1914, the Treasury Department at the United States Mint in Philadelphia delivered to the Post Office Department 1,000 bags, each containing $5,000 in gold and weighing 18¾ pounds, for transmission to Boston by mail (Tr. 13).

The bags were sealed at the mint before delivery to the postal authorities and were placed in 167 mail pouches which were locked with rotary mail locks and labeled "Boston, Mass." Postage of $420 was prepaid by the Treasury as the amount required for fourth-class mail matter at parcel-post rates (Tr. 13).

The Post Office Department received and treated the bags as mail matter of the fourth class, which

were placed in a storage mail car in which through mails inclosed in pouches and sacks are deposited and transported between stated points, in which no distribution of the mails is performed, and which may be either a car specially equipped with stanchions for the separation of the made-up mails according to destinations, or an ordinary baggage car (Tr. 13).

Five railway mail officials and postal clerks, who held the regular travel commissions for carriage over the railroad, accompanied the car from Philadelphia to New York in New York and Pittsburgh R. P. O. train No. 34 of the Pennsylvania Railroad. On arrival at New York the 167 pouches were placed in a vault at the subtreasury (Tr. 13).

On October 24, 1914, the chief clerk of the Railway Mail Service, subject to whose call the pouches were, and other railway mail officials took the 167 pouches in auto mail trucks from the subtreasury to the Grand Central Station and placed them in postal car of Boston, Springfield and New York R. P. O., which was attached to regular passenger train No. 50 of New York, New Haven & Hartford Railroad Company, which was by the latter carried to Springfield, Mass., over postal routes Nos. 106004 and 106005; thence to Boston over the Boston & Albany Railroad (New York Central, lessee), accompanied by seven officials of the Railway Mail Service, all holding the regular travel commissions for carriage over the routes as prescribed by law.

On November 14, 1913, the Postmaster General, in accordance with the act of March 4, 1913, increased

the company's compensation for the transportation of mails on route 106005, at the rate of $2,595.03 per annum, being $42.9144 per mile for 60.47 miles and 5 per cent increase fixed by readjustment from July 1, 1913, based on weighing from September 4 to December 17, 1912, inclusive, which made the total compensation thereafter at the rate of $54,495.82 per annum, or $901.2043 per mile for 60.47 miles (Tr. 12).

On December 4, 1913, the Postmaster General, in accordance with the act of March 4, 1913, increased the company's compensation for the transportation of mails on route 106004, at the rate of $17,211.57 per annum, being $75.1105 per mile for 229.15 miles; and 5 per cent increase fixed by readjustment from July 1, 1913, based on weighing from September 4 to December 17, 1912, inclusive, which made the total compensation thereafter at the rate of $361,442.99 per annum, or $1,577.3205 per mile for 229.15 miles (Tr. 12).

In each instance the increase was based upon an ascertainment by an estimate of the increased weight of mails resulting from the establishment of the parcel post, and the company was in each instance notified on the same day (Tr. 13).

Without protest the company accepted and the Government paid the amount fixed by the readjustment orders for carrying the mails over the routes indicated and neither the Pennsylvania nor Boston & Albany companies has ever presented a similar or any claim growing out of the same transaction (Tr. 14).

Without even the semblance of any allegation of deception, misrepresentation, or fraud, and without any denial whatever of any lack of knowledge on the part of the company, its officers and agents, of the nature of the transaction, or of any protest whatever on their part that the appellant was under no obligation to receive and transport the gold as mail, but in a petition in general terms they now claim they had no contract "as to the price or the value of the services for said shipment of gold coin" or for the men accompanying the same (Tr. 3), and that they are entitled to compensation on the basis of express rates, i. e., the proper proportion of the through joint express rate, $1 for each $1,000 between New York and Springfield, or $5,000, and seven passenger fares, $2.95 each, or $20.65, total, $5,020.65 (Tr. 3).

ARGUMENT.

I.

THE GOLD COIN WAS MAILABLE.

A. THE STATUTES AND THE FINDINGS OF THE COURT OF CLAIMS ESTABLISH THAT THE GOLD COIN WAS FOURTH-CLASS MAIL MATTER.

Concerning the nature of the action counsel say (Br. 6) "It is an action for the transportation of express matter not included by law or by any rule or regulation of the Post Office Department within the classifications of mail matter. * * * The appellant in this case is not asking for additional pay for hauling the mails. Its rights in such a case were foreclosed by the decision of this court in the case of *New Haven Railroad Company* v. *the*

United States (251 U. S. 23); and no such claim is repeated in this action."

Again, counsel say (Br. 10): "From these facts it is plain that the shipment of gold coin in packages of 18.75 pounds, which were not mail matter *at all of any kind*, and were not included within the contract with the appellant, or within the compensation paid for carrying the mails."

Thus counsel for the appellant would seem to indicate that the gold coins were unmailable.

Such an argument is contrary to the statutes, the opinions of this court construing the same, and the long-established practice.

Section 8 of the act of August 24, 1912 (37 Stat. 539, 557), provides:

> SEC. 8. That hereafter fourth-class mail matter shall embrace all other matter, including farm and factory products, not now embraced by law in either the first, second, or third class, not exceeding eleven pounds in weight, nor greater in size than seventy-two inches in length and girth combined, nor in form or kind likely to injure the person of any postal employee or damage the mail equipment or other mail matter and not of a character perishable within a period reasonably required for transportation and delivery.

The act further provides, for carrying out the purposes of section 8, the United States and its several Territories and possessions, except the Philippine Islands, should be divided into eight postal

zones, which, by direction of the Postmaster General, were accordingly established as therein provided.

The act of March 4, 1913 (37 Stat. 791, 797), provides:

> That on account of the increased weight of mails resulting from the enactment of section eight of the act of August twenty-fourth, nineteen hundred and twelve, making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and thirteen, the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after July first, nineteen hundred and thirteen, for the remainder of the contract terms, not exceeding five per centum thereof per annum, excepting upon routes weighed since January first, nineteen hundred and thirteen, and to be readjusted from July first, nineteen hundred and thirteen, until otherwise provided by law.

The Court of Claims found (Tr. 11):

> The Postmaster General, on July 25, 1913, reclassified and re-formed the weight limit of parcel-post packages for transportation in the first and second zones by increasing the weight limit from 11 to 20 pounds, and on December 18, 1913, by increasing the weight limit in all zones from 11 to 20 pounds, and in the first and second zones by increasing the weight limit from 20 to 50 pounds. On July 25, 1913, the rates of postage on parcels exceeding 4 ounces in weight for delivery in the first and second zones were fixed at 5 cents for the first

pound and 1 cent for each additional pound or fraction thereof.

On December 6, 1913, for delivery in the third zone the rates of postage were fixed at 6 cents for the first pound and 2 cents for each additional pound or fraction thereof; for the fourth zone at 7 cents for the first pound and 4 cents for each additional pound or fraction thereof; for the fifth zone at 8 cents for the first pound and 6 cents for each additional pound or fraction thereof; and for the sixth zone at 9 cents for the first pound and 8 cents for each additional pound or fraction thereof.

The plaintiff, on August 15, 1913, in a letter to the Post Office Department, protested against the increase in weight of parcel-post packages and reserved the right to decline to carry the additional mail matter without additional compensation.

On August 22, 1913, the Second Assistant Postmaster General replied that the plaintiff, under the law, if he continued to carry the mails, was not entitled to additional compensation.

The bags of coin were placed in mail pouches. These pouches were locked with rotary mail locks and labeled "Boston, Mass." The postage was prepaid on fourth-class mail matter at parcel-post rates. The Post Office Department received at Philadelphia the bags as fourth-class mail matter. The pouches were placed in a storage mail car. The car moved in New York and Pittsburgh U. P. O. train No. 34 of the Pennsylvania Railroad. The car was accompanied

by five railway mail officials and postal clerks from Philadelphia to New York, all of whom held the regular travel commissions used in such cases.

Section 881, sub No. 2, of the Postal Rules and Regulations of 1913, cited by appellant (Br. 12), makes gold coin mailable matter.

Gold coin is not unmailable under the Postal Laws (secs. 479–486, P. L. & R., ed. 1913), and "what matter should be absolutely excluded from the mails" is within the jurisdiction of the Second Assistant Postmaster General (sec. 471, P. L. & R., ed. 1913).

The matter of wrapping and securing fourth-class mail matter for transportation purposes is also for the benefit of the service (sec. 469, id.; 472 to 475, id.).

Congress by legislation has long since established the policy of intrusting money and valuables to the mails.

Section 3926, R. S. (17 Stat. 300, June 8, 1872), authorizes the Postmaster General to establish a uniform system of registration "for the greater security of valuable mail matter."

Section 3932, R. S. (17 Stat. 307, June 8, 1872), provides for the transmission by registered mail of certain currencies of the United States without the payment of registry fees.

Title VI of the Postal Laws and Regulations, 1913, sets forth in detail the numerous regulations of the department relating to such registry service.

The Postmaster General, in his annual report to Congress for 1909, page 335, shows by a table the amount of money and money values belonging to the

United States transmitted during the fiscal year, consisting of postal funds, surplus money-order funds, postage stamps, and stamped envelopes, money sent and received by the Secretary of the Treasury, the Register of the Treasury, Commissioner of Internal Revenue, Comptroller of Currency, Auditor for the Post Office Department, the Treasurer of the United States, and the Assistant Treasurer of the United States aggregating $2,353,840,251. The report for 1910, page 315, shows $2,392,543,234. The report for 1911, page 353, shows $3,002,215,452. The report for 1912, page 297, shows $3,464,980,987. The report for 1913, page 346, shows $2,891,578,735. Further argument would seem unnecessary that gold coin is mailable.

Counsel further say (Br. 14): "If the railroad company had known that such a shipment of gold coins was to be made on October 24, 1914, and had positively refused to transport the same, neither the Secretary of the Treasury nor the Postmaster General could have compelled the performance of this service by a writ of mandamus, or any other process of court. If the appellant had on that date known of the prospective shipment, and then had refused to transport the same as mail matter, it could not be said that an action would lie against the appellant for violation of its contract, as set out in the distance circular of July 1, 1913."

It is not clear that the foregoing statement is intended to convey that appellant, its officers and

agents, had no knowledge of this transaction until after it was consummated. There is no such allegation in the petition. Moreover, it is inconceivable that the Post Office Department could deliver to appellant and the latter receive 167 mail pouches containing 1,000 bags, each bag containing $5,000 in gold and each weighing 18¾ pounds, without some previous arrangement between the department and appellant for the placing of the mail storage car and the loading thereof before the departure of the train. In any case, postal car of Boston, Springfield, and New York R. P. O. appears to have been ready when two or more auto mail trucks reached the Grand Central Station and the 167 pouches were transferred from the trucks into the mail car. That done, seven able-bodied men, holding the requisite travel commissions from the Postmaster General, accompanied the car which moved out over appellant's railroad over postal routes Nos. 106004 and 106005 to Springfield, Mass. (Tr. 13).

That appellant, through its officers and agents, was aware of the nature of the article transported must be assumed as a fact in this case.

B. THE CONTRACT BETWEEN APPELLANT AND THE POSTMASTER GENERAL INCLUDED THE SHIPMENT OF GOLD COIN AS PARCEL-POST MATTER.

To escape the findings of the Court of Claims, counsel for appellant simply argue that the gold was unmailable and therefore not within the contract which existed between appellant and the Postmaster General. As the gold was mailable, the contention fails.

C. THE RECEIVING AND TRANSPORTING THE GOLD AS FOURTH-CLASS MAIL MATTER WITHOUT PROTEST AND ACCEPTING ITS REGULAR COMPENSATION FOR TRANSPORTING THE MAILS CONSTITUTES AN ESTOPPEL AGAINST WHICH APPELLANT MAY NOT PREVAIL.

In receiving and transporting the pouches containing the gold as fourth-class mail matter and accepting compensation from the Postmaster General without protest, appellant is well within the adjudicated cases which hold it is not entitled to recover.

The Court of Claims dismissed the petition on the authority of *N. Y., N. H. & H. R. R. Co.* v. *United States*, 53 C. Cls. 222; 251 U. S. 123; *Mail Divisor Cases*, 53 C. Cls. 258; 251 U. S. 326. (Tr. 14).

In the *Mail Divisor Cases*, 251 U. S. 326, 339, Mr. Justice Pitney, with whom concurred Mr. Justice McKenna, in an opinion concurring in the affirmance of the judgment, but upon somewhat different grounds than those expressed in the opinion of Mr. Justice Holmes, said:

> From the findings of the Court of Claims it appears that in all of these cases there were express contracts; and I concur in the view of that court (53 Ct. Cls. 258, 308, 315, 318, 319) that the contracts arose not out of the Distance Circular, in which the Postmaster General specially called notice to Order No. 412, and to which some of the claimants responded with protests, more or less explicit, that they would not be bound by that order, but arose out of what subsequently happened. The Postmaster General in every case informed the protesting carriers that he would not enter into contract with any railroad company excepting

it from the operation of any postal law or regulation. The mails were weighed and the average weight ascertained in accordance with Order No. 412, as all the claimants had been notified would be done; thereafter the Postmaster General, upon the basis of the weight thus ascertained, caused the maximum statutory rate to be calculated, issued orders naming certain amounts thus arrived at as the compensation for the service, and gave notice in proper form to the carriers specifying in terms the readjusted pay that would be allowed, "subject to future orders and to fines and deductions." Thereafter the carriers received and transported the mails as offered, periodically accepted compensation in accordance with the readjustment notices, and proceeded thus without further objection or protest until the end of the respective quadrennial periods. In short, although in some cases they declared they would not consent to the ascertainment of average weights on the basis of Order No. 412, they did not insist upon their objection in the face of the Postmaster General's declaration that he would not accede to it. * * *

I deem it clear, therefore, that the claimants in fact accepted the Postmaster General's offers as contained in the readjustment notices, by proceeding to perform the prescribed service in accordance therewith and accepting the compensation due to them therefor. And so the Court of Claims held (53 Ct. Cls. 258, 308, 313, 315, 318, 319).

In *N. Y., N. H. & H. R. R. Co.* v. *United States*, 251 U. S. 123, 126, 127, the original petition, as shown

by the records in this court (No. 74, October term, 1919) filed June 28, 1915, as amended January 26, 1917, with respect to certain actions of the Postmaster General, alleged:

> * * * he has made greater and more expensive demands as to rooms in stations for handling the mails; he has made many and extensive demands in the handling and the disposition of the mails at the several stations along the lines of the railroad, and in the transportation of the mails between the stations and the post offices not more than 80 rods therefrom; he has required the hauling of vast amounts of gold coin as mail of the fourth-class in violation of law and without compensation to the carriers; he has required the carrying of mail on limited trains, * * *."

Mr. Justice McReynolds, in delivering the opinion of the court, said:

> Concerning the challenged interpretation and application of sec. 4002, Rev. Stats., resulting in payments during each four-year term upon the basis of weights taken immediately prior to the beginning of the same instead of annually, it suffices to say that the action taken accords with prior practice followed for many years; the letter of the statute permits it; the carrier submitted with full knowledge; and, impliedly at least, it was sanctioned by this court in *Delaware, Lackawanna & Western R. R. Co.* v. *United States*, 249 U. S. 385.
>
> We think it must be treated as settled doctrine that prior to the act of July 28, 1916, c. 261, 39 Stat. 412, 429—with the exception

of certain roads aided by land grants—railroads were not required by law to carry the mails. *Eastern R. R. Co.* v. *United States*, 129 U. S. 391, 394; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, 650; *Delaware, Lackawanna & Western R. R. Co.* v. *United States, supra*. And as appellant voluntarily accepted and performed the service with knowledge of what the United States intended to pay, it can not now claim an implied contract for a greater sum. It may be that any railroad by failing to carry the mails would incur the hostility of those living along its lines and as a consequence suffer serious financial losses; but the fear of such results certainly does not amount to compulsion by the United States and can not constitute the basis of a justiciable claim against them for taking property.

D. APPELLANT PERFORMED NO EXPRESS SERVICE.

Counsel maintain that as the gold was unmailable appellant is entitled to express rates for carrying the mail pouches containing the gold in a railway post-office car in charge of seven men who accompanied the shipment, for whose transportation it also claims the regular passenger fares.

The men were not regular passengers on the train but custodians of the gold. They did not travel on regular tickets but on travel commissions. If they were in the mail car, they certainly did not get the benefit of the comforts and conveniences of a passenger car. As to the gold, as the company performed only the service of transporting fourth-class mail matter, it is not entitled to express rates. The case would be different if the gold had been trans-

ported by express and the compensation adjusted on the basis of fourth-class mail, or if the men had traveled as passengers and had paid only the regular travel commission fares.

Equally without merit is the argument that the pouches were not stamped according to law or that the Postal Rules and Regulations may not otherwise have been complied with. The Government itself was handling the coin and the ordinary rules and regulations which apply to non-Government transactions need not strictly apply to the Government. Nor is the manner in which the pouches were stamped or otherwise marked the complaint of the appellant. After receiving, transporting, delivering, and accepting compensation for the transportation of the gold as fourth-class mail matter without protest of any kind the attempt to recover express rates and passenger fares for the transportation of the gold and the men is a belated afterthought.

It is noteworthy that neither the Pennsylvania Railroad nor the Boston & Albany has filed any petition or otherwise presented any claim against the Government for or on account of this transaction.

The judgment of the Court of Claims dismissing the petition should be affirmed.

JAMES M. BECK,
Solicitor General,
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
JANUARY, 1922.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 96. Argued January 19, 1922.—Decided February 27, 1922.

A railroad after accepting and transporting without protest, as mail matter, a shipment of gold in mail sacks consigned by the Treasury Department, and after receiving the amount fixed by readjustment for carrying mail matter under its contract therefor, has no claim for additional pay for carrying the gold and attendant railway mail guards, whether the shipment was properly mail matter and the requirements of the statute concerning postal service were technically complied with, or not. P. 33.

55 Ct. Clms. 536, affirmed.

APPEAL from a judgment of the Court of Claims dismissing appellant's petition.

Mr. S. S. Ashbaugh, with whom *Mr. E. G. Buckland* and *Mr. A. P. Russell* were on the brief, for appellant.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a claim for $5,020.65 as the claimant's proportion of joint through express rates for carrying $5,000,000 in gold from Philadelphia to Boston, and the passenger fares for seven men who accompanied the gold as guards from New York to Springfield, Massachusetts, that being the distance that the claimant carried the gold. The Court of Claims ordered the petition to be dismissed.

On October 23, 1914, the gold was delivered by the Treasury Department to the Postoffice Department in one thousand sealed bags, each weighing 18¾ pounds, which were placed in one hundred and sixty-seven locked mail pouches labelled "Boston, Mass." The Treasury prepaid the postage required for fourth class mail matter, at parcel post rates, amounting to $420. On reaching New York the gold was placed in a vault subject to the call of the chief clerk of Railway Mail Service. The next day the chief clerk and other railway officials took the pouches to the Grand Central Station where they were placed in a postal car attached to a regular passenger train of the claimant. The car with its contents was carried to Springfield and there delivered to the Boston and Albany road. It carried with the gold seven officials of the Railway Mail Service, all having the requisite travel commissions from the Postmaster General. No protest was made by any carrier and the claimant was paid and received without protest the amount fixed by readjustment orders for carrying the mail over its route.

The claimant admitting that it could not demand additional pay for hauling the mails, *New York, New Haven & Hartford R. R. Co.* v. *United States*, 251 U. S. 123, argues that the transaction was not "mail service" such as it had contracted to perform or within the classification of mail matter. It urges that in view of the weight limit,

eleven pounds, in force July 1, 1913, when its four-year term began; the weight of these bags, 18¾ pounds; of the contents, gold; and of the fact that the bags were sealed and placed in locked pouches, the Postmaster General could not make the service mail service if he tried. We think it unnecessary to discuss the argument, if there is anything in it. The service here, rightly or wrongly, was demanded as mail service, was rendered as mail service and was paid for without protest as mail service. Whether the Treasury technically complied with all the requirements of the statute concerning postal service did not matter to the claimant. By giving its claim a different name from that passed upon in *New York, New Haven & Hartford R. R. Co.* v. *United States*, 251 U. S. 123, 127, the claimant does not better its case.

Judgment affirmed.

MR. JUSTICE PITNEY was absent and took no part in the decision.